Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1977

No. 77-240

ST. PAUL FIRE & MARINE INSURANCE CO., AETNA CASUALTY & SURETY CO., TRAVELERS INDEMNITY OF RHODE ISLAND, TRAVELERS INDEMNITY CO. OF RHODE ISLAND, TRAVELERS INSURANCE CO., HARTFORD CASUALTY COMPANY and HARTFORD FIRE INSURANCE CO.,

Petitioners,

v.

DAVID M. BARRY, M.D., LEROY S. CHAPNICK, M.D., WALTER C. COTTER, M.D., PAUL J. M. HEALEY, M.D., ANTHONY F. MERLINO, M.D., PAUL B. METCALF, M.D., H. GERALD ROCK, M.D., and ROSARIO V. TOMASELLI, M.D.,

and

PENNY ANDREW, CONSTANCE V. BOISSE, CHRISTOPHER DANIELS, ARTHUR H. FERLAND, GLADYS L. SPAIGHT, and ALPHONSE D. VITULLO,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Petitioners St. Paul Fire & Marine Insurance Company, The Aetna Casualty and Surety Company, Hartford Casualty Company, Hartford Fire Insurance Company and Travelers Insurance Company submit this reply brief in support of their petition for a writ of certiorari.

Respondents, in their brief in opposition, acknowledge the existence of a conflict between the circuits in the interpretation of the boycott exception. However, they argue

that resolution of the conflict is premature because they believe that the First Circuit's opinion will persuade the many courts which have taken a contrary view and thus, in time, erase the conflict which now exists.

This argument is based in part on the appeal said to be pending in the Fifth Circuit in *Royal Drug Co.* v. *Group Life and Health Insurance Co.,* reported below at 415 F. Supp. 343 (W.D. Texas 1976). Respondents suggest that the Court of Appeals for the Fifth Circuit, having "the benefit of the *Barry* and *Proctor* opinions," may well overrule its earlier decision in *Meicler* "within the coming year." (Respondents' Br. at 18-19.) In fact, the Fifth Circuit decided *Royal Drug* on August 8, 1977, without in any way addressing the "boycott" issue or disturbing its prior holding in *Meicler.* 1977-2 Trade Cases (CCH) ¶61,578 (5th Cir. 1977). Rather, the District Court was reversed on the ground that the case did not involve the "business of insurance" within the meaning of the McCarran-Ferguson Act. A petition for rehearing *en banc* with respect to the "business of insurance" issue alone is now pending. Here, all parties agree that the facts of this case involve the "business of insurance."*

Respondents' speculation that the Ninth Circuit may soon use the appeal in *Pastor* v. *Hartford Fire Insurance*

* Respondents also suggest that *Meicler* is not an authoritative statement of the Fifth Circuit view, but merely creates an intra circuit conflict with the Fifth Circuit's earlier decision in *Battle* v. *Liberty National Life Insurance Co.,* 493 F.2d 39 (5th Cir. 1974), *cert. denied,* 419 U.S. 1110 (1975). Even the First Circuit, in its opinion in this case, refused to accept that argument. 555 F.2d at 7. Instead, it expressly acknowledged that *Battle,* which did not involve claims by policyholders, was distinguishable from the claims presented in *Meicler* and in this case.

Co., 1976-1 Trade Cases (CCH) ¶60,783 (C.D. Cal. 1976), *appeal docketed,* No. 77-1243 (9th Cir. Jan. 26, 1977), as a vehicle to overrule its prior decision in *Addrisi* v. *Equitable Life Assurance Society of the United States,* 503 F.2d 725 (9th Cir. 1974), *cert. denied,* 420 U.S. 929 (1975), is similarly unfounded. The only questions presented on appeal in *Pastor* relate to the sufficiency of state regulation and the scope of the "business of insurance" within the meaning of the McCarran-Ferguson Act. The district court's interpretation of the boycott exception, in accord with *Addrisi,* is unchallenged.

We have learned that another case pending in the Ninth Circuit, *Workman* v. *State Farm Mutual Insurance Company,* No. C-75-1799 RFD (N.D. Cal. Sept. 16, 1976), *appeal docketed,* No. 76-3549 (9th Cir. Dec. 1, 1976), does pose questions concerning the proper interpretation of the boycott exception. That case, however, presents antitrust claims raised by providers of insured services, not policyholders. It cannot, therefore, resolve the important issue presented by the petition here, *i.e.,* whether the boycott exception will now be read to allow policyholders to assert grievances about the terms of their insurance, previously addressed to state insurance departments, as federal antitrust claims.

Respondents, finally, fail to suggest any reason to believe that the Third Circuit will repudiate the *Meicler-Addrisi* rule, adopted by it as recently as May 2, 1977. Instead, they deny that that Circuit has ever joined the *Meicler-Addrisi* camp. They misread *Frankford.*

In *Frankford Hospital* v. *Blue Cross,* 417 F. Supp. 1104 (E.D. Pa. 1976) *aff'd* 554 F.2d 1253 (3d Cir. 1977), *cert.*

denied, 46 U.S.L.W. 3218 (U.S. October 3, 1977), the Court of Appeals for the Third Circuit approved *per curiam* a District Court decision which specifically relied on the *Meicler* decision, holding that a broad interpretation of the "boycott" exception, such as that adopted by the Court of Appeals here, would in fact "swallow up the body of the McCarran-Ferguson exemption." 417 F. Supp. at 1110.

The plaintiffs in *Frankford* also read the Third Circuit's decision as we do. In their petition for a writ of certiorari they stated:

> "When it affirmed the district court's decision in the instant case, the Third Circuit implicitly joined the Fifth and Ninth Circuits in the view that those words 'boycott,' 'coercion' and 'intimidation' are to be read as referring only to boycotts and other coercive acts which are directed against insurance companies and their agents by other insurance companies and their agents." Petition at 8.

This Court let stand the *Frankford* decision when it denied certiorari in that case on October 3, 1977. We note that *Frankford* involved a *per curiam* decision, with no discussion of the issues by the Court of Appeals. By contrast, the extensive discussion by the majority and dissenting opinions in this case provide the type of circuit court analysis of the issues so helpful to full review by this Court. Unlike *Frankford,* moreover, it is the result reached in this case which, if allowed to stand, poses the dangers of policyholder suits set forth in our petition.

There is, as shown above, no likelihood that the conflict between the circuits will be resolved unless this Court accepts review here. There is every reason to believe that, absent such review, insurers will continue to be subject to different standards of conduct in different sections of the country. This likelihood is heightened by the fact that the only Court of Appeals decision to take up the meaning of the boycott exception since *Barry—Proctor* v. *State Farm Mutual Automobile Insurance Co.,* 1977-1 Trade Cases (CCH) ¶61,481 (D.C. Cir. 1977)—did in fact recognize dangers in abandoning the *Meicler-Addrisi* rule which the First Circuit rejected, and did in fact create a third standard for decision so as to ameliorate those dangers.*

Finally respondent's perception of the *Barry* decision as a bellwether for future decisions is one which should hasten rather than delay review. So long as it is allowed to stand, *Barry* can be expected to generate a stream of suits brought by policyholders dissatisfied with the terms of their insurance. This increase in federal litigation in an area previously thought the exclusive domain of state insurance departments should not be allowed without review by this Court.

Respondents' brief in opposition is unpersuasive in arguing for avoidance of review at the present time to allow courts in disagreement with the First Circuit to improve upon "the many superficial opinions presently available" and to permit "all of the relevant issues [to be] fully aired in the courts of appeals." (Respondents' Br. at 19.)

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* The Court of Appeals decision in *Proctor* is analyzed at pages 16-18 of our petition. The Court of Appeals for the District of Columbia has since denied a petition for rehearing *en banc,* No. 76-1183 (D.C. Cir. July 22, 1977), and no petition for a writ of certiorari has been filed.

No less than five Courts of Appeal have already stated their differing interpretation of the boycott exception in clear and unmistakable terms. This Court need not await the generation of yet additional litigation and further appeals before expressing its own opinion on this important question of statutory interpretation.

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Respectfully submitted,

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